



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

JUN 2 2003

**VIA FACSIMILE AND**  
**U.S. MAIL**

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Re: Request for Remand - Consistency Appeal of the Islander East Pipeline Company

Dear Counsel:

On May 15, 2003, Islander East Pipeline Company, L.L.C. (Islander East) filed a request asking that its appeal be remanded to the Connecticut Department of Environmental Protection, pursuant to 15 C.F.R. §930.129(d). This provision allows appeals filed under the Coastal Zone Management Act to be remanded "to the State agency for reconsideration of the project's consistency . . . if significant new information relevant to the State agency's objection, that was not provided to the State agency as part of its consistency review, is submitted to the Secretary. . . ." Id. The State of Connecticut advised on May 23, 2003, that it does not object to a remand of the appeal for this purpose; nor does it object to the period of the remand ending no later than July 31, 2003, as proposed by Islander East.<sup>1</sup>

Connecticut's objection to Islander East's proposed natural gas pipeline, issued in October 2002, was based on a number of concerns including potential adverse impacts to: (a) water quality in Long Island Sound; (b) shellfish habitat; and (c) two tidal wetland areas. The State's objection also identified an alternative to the proposed route of the Islander East project. New information

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<sup>1</sup> See letter from Frank L. Amoroso, Nixon Peabody LLP (representing Islander East) to Brandon Blum, NOAA, U.S. Department of Commerce, May 15, 2003, at 2.



submitted to the Secretary of Commerce by Islander East involves changes to construction plans intended to minimize adverse impacts and address concerns raised by the State's objection.<sup>2</sup> These changes were not submitted to the State at the time it conducted its review of the consistency certification for the Islander East project.<sup>3</sup>

The regulatory provision concerning remands (15 C.F.R. §930.129(d)) also requires that the information on which the request is based be "significant." In determining the significance of new information to issues raised by a State's objection, the Department's inquiry is largely a matter of first impression. This reflects the fact that the question of whether the State's objection was correctly decided, and the degree to which the State relied on various issues in reaching that decision, is not directly before the Secretary. Thus information which is new and related to the State's objection, but which appears to be of minor consequence, would not be sufficient to warrant a remand because the State would be unlikely to alter its objection to the project. In such a situation, a remand would serve no purpose other than to delay the appeal process and would not be justified.

In this appeal, we note that Islander East characterizes the new information as involving significant reductions to the project's environmental impacts on the offshore environment in Long Island Sound.<sup>4</sup> Further, Islander East appears to have treated this information as a key factor in its decision to, in effect, provide Connecticut with additional time to review a water quality permit application for the project. As noted previously, adverse impacts to water quality in Long Island Sound are one of the reasons for Connecticut's objection to the project. These circumstances suggest that the new information is of sufficient importance that it could lead to the State's reconsideration of its original decision to object to Islander East's project. Consequently, I find the new information is significant.

Having concluded that the requirements of 15 C.F.R. §930.129(d) are satisfied, and noting that the State of Connecticut has no objection to Islander East's request, the appeal is remanded to the Connecticut Department of Environmental Protection, through the period ending July 31, 2003. The purpose of the remand is to allow the State to reconsider the project's consistency with the

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<sup>2</sup> For example, the information accompanying the remand request indicates that Islander East will reduce the number of anchored barge passes and place certain dredged spoil onto barges instead of sidecasting it onto the seafloor. Islander East Pipeline Project Permit Application for: 401 Water Quality Certificate, prepared by Natural Resource Group, Inc., March 14, 2003, Attachment A, at 1. See generally summary of new information as contained in an attachment to the remand request. In its letter requesting a remand, Islander East also advised of the formal withdrawal of the project identified as a reasonable alternative in the State's objection letter.

<sup>3</sup> Islander East submitted the modified offshore construction techniques to the State for review on February 19, 2003, in connection with a pending application for a water quality permit certification. The modifications are also described in a replacement application for the permit submitted on March 13, 2003. See letter from Gene H. Muhlherr, Islander East Pipeline Company to Charles Evans, Connecticut Department of Environmental Protection, March 13, 2003, at 1.

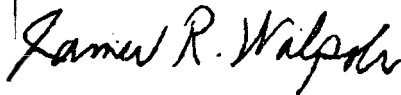
<sup>4</sup> *Id.*, at 1. See also, summary of new information attached to Islander East's remand request.

enforceable policies of the State's coastal management program.<sup>5</sup> Consequently, proceedings of the appeal are stayed for the same period. No later than the end of the remand period, the State shall advise whether it objects to, or concurs in, the proposed activity.

In the event the appeal is recommenced, the State of Connecticut's brief and any supporting information and data will be due as stated in our March 17, 2003 letter. During the pendency of the current stay, public and agency comments will be accepted. Upon recommencement of the appeal, both comment periods shall be extended in order to provide the public and interested federal agencies with an adequate opportunity to consider the State's brief.<sup>6</sup> Specific closing dates for the public and agency comment periods as well as the date and location of a public hearing will be determined following the resumption of proceedings for the appeal.

If there are any questions concerning the remand or stay, please contact Branden Blum of this office.

Sincerely,



James R. Walpole  
General Counsel

<sup>5</sup> An attachment to Islander East's remand request advises that the company is providing additional information sought by the State in order to process the pending water quality certificate permit application. Islander East expects to simultaneously provide this information to Connecticut and to the Department on or about May 23, 2003, and asks that the additional material "be included in the remand directive. . . ." Attachment to letter from Frank L. Amoroso (representing Islander East) requesting a remand, *supra*, at 3.

Although the language of Islander East's request is somewhat vague, we understand Islander East to be asking that this yet-to-be-produced information be considered to be part of the "new significant information" on which the remand is based. We are unable to grant this request. Notably, Islander East has not submitted the information to the Secretary at the time of the remand, and therefore, has not satisfied the requirement of 15 C.F.R. §930.129(d) ("[t]he Secretary may . . . remand . . . if significant new information . . . is submitted to the Secretary. . . .") Further, although the forthcoming information may well be relevant and significant to the State's review, the State's interests would be prejudiced by having less than the full remand period to consider the additional submission. This is an important consideration as our regulations provide the period of the remand cannot exceed three months. 15 C.F.R. §930.129(d). Also, we note that our remand decision does not restrict the scope of the information that the State may review when reconsidering its objection to the proposed pipeline project.

<sup>6</sup> The additional comment period to be provided if the appeal recommences will not be commensurate with the length of the stays. This is a change to the advice contained in our letters of March 17, 2003 and May 2, 2003, and reflects the ongoing nature of the stay. The stay originally requested at the time we provided our earlier advice was far shorter than the current request.